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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THERESE HALL et al., Plaintiffs and Appellants, v. CRITTENDON AND ASSOCIATES LTD., et al., Defendants and Appellants.	A133235 (Alameda County Super. Ct. No. VG08-372735)

In this case involving claims for negligent filing of a tax return and negligent giving of tax advice, Therese and Kenneth Hall appeal from a judgment upon a court verdict finding against them on their claims for negligent and intentional infliction of emotional distress, and from the order denying their motion to amend the complaint to bring an action for violations of the licensing provisions of Business and Professions Code, section 22251, et. seq. They contend that the trial court erred in: (1) concluding that they were not entitled to recover emotional distress damages, (2) finding that they did not allege a cause of action for fraud; and (3) denying their motion to amend their complaint to allege statutory licensing violations. In a cross-appeal, respondents Crittendon and Associates, Ltd. dba EZ E-File Tax Preparers, Ajeenah Rasheed Crittendon, and Steve Kyles (collectively, EZ E-File) contend that the court erred in denying their motions in limine to bar the Halls' claims for negligent preparation of tax returns and negligent tax advice on statute of limitations grounds. They also argue that

the court erred in awarding damages on a claim for fraudulent inducement to loan money. We conclude that the cross-appeal has merit and therefore reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Prior to 2004, the Halls used a certified public accountant to prepare their tax returns. In 2004, Therese Hall decided not to return to the accountant because she was paying a large fee and she had found an error on the last return. Hence, in April 2004, Hall decided to contact EZ E-File about preparing the Halls' 2003 tax return. At EZ E-File's office, Hall met with Crittendon and made an appointment to return with the documents necessary to prepare the tax return. The Halls returned to EZ E-File with their tax documents and met with Kyles. Kyles told them that there were certain deductions to which they were entitled that they had not previously taken. He also informed them that their accountant had not done their prior tax returns properly. Kyles explained that it was possible to file amended returns, but that the three-year statute of limitations might apply.

EZ E-File subsequently prepared the Halls' 2003 tax return and amended their tax returns for the tax years 1998–2003. Crittendon told the Halls that if they were ever audited, that EZ E-File would see them "through it" at no additional cost.

In amending the 1998 tax return, Kyles reduced the Halls' adjusted gross income from $68,781 to $3,175. Kyles never explained the return to Hall or how he was able to reduce the tax liability. For the 1999 return, Kyles reduced the Halls' income from $66,658 to a negative $32,344. The Halls did not read the amended returns before they were filed. Income on the amended tax returns for 2000 and 2001 was similarly reduced,

[1] Our review of this case was made extremely difficult due to the Halls' failure to set forth a complete statement of facts supported by adequate citations to the record. Their statement of facts contains no citations to the record in contravention of the California Rules of Court. We remind counsel for the Halls that an appellant has a duty to provide adequate record citations including cites for *every* statement of fact. (Cal. Rules of Court, rule 8.204(a)(1)(C) ["Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."]; see also *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.)

by $95,000 and $76,000, respectively. In preparing the amended returns, EZ E-File did not request any business records for the prior tax years.

In June 2004, the IRS notified the Halls that their claims for refunds of taxes paid for the tax years of 1998–2000 were disallowed based on the statute of limitations. The IRS opted to audit the amended 2001–2003 returns. Hall notified EZ E-File and was told that it would charge $100 an hour to represent them through the audit process. Hall was shocked by the fee, but felt that she had to pay it.

EZ E-File represented the Halls during the audit process and charged them $8,350. While the audit process was ongoing, Crittendon informed the Halls that she was closing her business because she could no longer afford to pay the rent on the office space. She advised the Halls that she would continue with the audit process to its conclusion. Hall thereafter offered to lend Crittendon the money she would need to stay in business. Crittendon told Hall that she would need $7,500. She later asked that the loan amount be increased to $8,000. Hall agreed to lend Crittendon $8,000; Crittendon executed a promissory note promising to pay that amount plus five percent interest before March 31, 2006.

As the audit progressed, the Halls became very dissatisfied with EZ E-File's representation. They found it difficult to obtain any information on the status of the audit. In August 2005, David Sinclair, the IRS field agent, completed the IRS audit. The IRS made proposed findings for the tax years 2001 to 2003, disallowed the Halls' claims for refunds, and found that they owed taxes for the years 2002 and 2003. The IRS found that the Halls owed additional tax, interest, and penalties of $11,400.90 for 2002 and $12,322.69 for 2003. The IRS gave the Halls 30 days to protest the proposed tax deficiency assessment. The Halls did not respond to the IRS's proposed findings.

In January 2006, the IRS sent the Halls a Notice of Deficiency assessing taxes owed and penalties imposed for 2002 and 2003. The Halls decided to retain Michael Gendelman, a tax attorney. They learned that the audit had not gone well, that they were subject to additional tax penalties and interest, and that they could be prosecuted for fraud. In preparing the Halls' case for the tax court, Gendelman sought information from

EZ E-File to substantiate the basis for the tax returns it prepared for the Halls. EZ E-File failed to provide any documents, and Kyles failed to provide any responses to questions that Gendelman had about the tax returns. Gendelman was nonetheless able to resolve the Hall's issues with the IRS favorably to the extent that penalties were eliminated. The IRS reduced the amount of taxes owed and the corresponding interest that would have been due and removed the fraud allegation.

In December 2006, Crittendon sent Hall a bill for Kyles' services in connection with the audit. She billed Hall $8,350, which she sought to apply against her loan balance of $8,400 ($8,000 principal plus $400 interest). Hall was outraged when she received the bill, and disputed it. She told Crittendon that she disagreed with the bill because Kyles had provided no documentation to Gendelman to substantiate the information he used in preparing the amended returns.

On February 22, 2008, the Halls filed a complaint seeking damages for negligence in the preparation of tax returns and the giving of tax advice, negligent and intentional infliction of emotional distress, and fraudulent inducement to loan money. On October 27, 2010, prior to the second scheduled trial date, the Halls sought to add a cause of action for violation of the tax preparer registration requirements of Business and Professions Code sections 22251 and 22253. The trial court denied the motion, finding that the plaintiffs should have been on notice of Crittendon's and Kyles's licensing status at the time they filed their initial complaint, and that the matter could have been raised before the first scheduled trial date.

On August 20, 2010, the court granted EZ E-File's motions in limine precluding evidence on the issue of emotional distress damages on the ground that the Halls could not seek damages for emotional distress in an accounting malpractice action where only economic damages are recoverable.

The case proceeded to a court trial on November 29, 2010. The court found in favor of the Halls on their claims for negligent preparation of tax returns and negligent tax advice. The court entered judgment against EZ E-File in the amount of $38,396.98, plus prejudgment interest from February 22, 2008.

II. DISCUSSION

1. The Cross-appeal

We initially address EZ E-File's cross-appeal, because the issues it raises are largely dispositive of the appeal.

EZ E-File first contends that the trial court erred in denying its motion in limine to dismiss the Halls' cause of action for negligent tax preparation on the ground that it was barred by the two-year statute of limitations of Code of Civil Procedure section 339.[2] We conclude that the trial court erred in ruling that the action was not barred.

As our Supreme Court held in *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 612, 617–618 (*Feddersen*), the statute of limitations in a negligent tax return preparation case accrues once the tax audit process is finalized and the IRS assesses the tax deficiency. This occurs, not upon a receipt of the IRS examiner's findings which may include any proposed deficiency assessments, but upon either the taxpayer's acknowledgement of the tax liability or upon the taxpayer's receipt of the notice of deficiency. (*Ibid.*) A taxpayer may acknowledge tax liability by filing forms No. 4549 and/or Form No. 870 which "(1) waives the required statutory notice of deficiency pursuant to Internal Revenue Code section 6212 (the 90-day letter), (2) waives the corresponding prohibition on collection for 90 days under Internal Revenue Code section 6213, and (3) is thereafter precluded from litigating the proposed deficiency in tax court." [Citations.][3] If the taxpayer does not agree with the examiner's proposed

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[2] Code of Civil Procedure section 339, subdivision 1 provides for a two-year statute of limitations for an action on an oral contract.

[3] " 'On concluding an office or field examination, the IRS invites the taxpayer to agree with the examiner's findings by executing Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) . . . . By signing Form 870, a taxpayer authorizes the IRS to assess the agreed deficiency and collect the resulting taxes without issuing a statutory notice of deficiency (90-day letter) under [Internal Revenue Code section] 6213(a). The IRS also uses Form 870 to indicate its acceptance of a claim for refund, in which case the refund [will be] processed without further formality.' " (*Sahadi v. Scheaffer* (2007)155 Cal.App.4th 704, 710, fn. 5,

findings, the findings will be reviewed in the district office, and the taxpayer will be sent a '30-day letter' instructing that the taxpayer has 30 days to file a protest. [Citation.] 'If the taxpayer fails to respond within the thirty days, a notice of deficiency will be issued . . . ." (*Id.* at p. 612.)

As explained in *Feddersen*, "the preliminary findings of the tax examiner are *proposed* findings that are subject to negotiation prior to any determination of tax deficiency. [Citation.] Once a deficiency is assessed, however, either by the taxpayer's consent to deficiency assessment, or by receipt of a final deficiency notice pursuant to Internal Revenue Code section 6212 et seq., the matter is final as to the IRS and subject to legal appeal in federal tax court." (*Id.* at pp. 612–613.)

Here, the record shows that the IRS commenced an audit of the Halls' 2002 and 2003 returns in October 2004. On August 16, 2005, the IRS notified the Halls that the auditor had made proposed findings and that the IRS intended to assess additional taxes for the 2002 and 2003 tax years. The IRS disallowed the Halls' claims for the tax years 2002 and 2003, noting that additional tax was owed for both years. It directed them to return either Form 2297 (Waiver of Statutory Notification of Claim Disallowance) or Form 3363 (Acceptance of Proposed Disallowance of Claim for Refund or Credit) and gave the Halls the option of filing a formal protest of the proposed tax deficiency assessment in 30 days. The Halls did not agree with the auditor's findings, did not file either Form 2297 or Form 3363, and did not protest the findings. Hence, on January 3, 2006, the IRS sent the Halls a "Notice of Deficiency" advising them that the IRS had determined that they owed additional tax and penalties for the 2002 and 2003 tax years. The notice provided that the Halls could contest the determination by filing a petition with the United States Tax Court within 90 days of the date of the notice. In early February 2006, the Halls hired Gendelman to represent them before the Tax Court.

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quoting Bittker & Lokken, Federal Taxation of Income, Estates and Gifts (2007) § 112.1.A2, fns. omitted [2007 WL 2325545, at p. *1].)

Gendelman negotiated a tax settlement with the IRS which resulted in the tax court decision that was entered on March 8, 2007.

Thus, pursuant to the notice of deficiency, dated January 3, 2006, the IRS finalized the audit process and assessed the tax deficiency. "The deficiency assessment serves as a *finalization* of the audit process and the commencement of actual injury because it is the trigger that allows the IRS to collect amounts due and the point at which the accountant's alleged negligence has caused harm to the taxpayer." (*Feddersen, supra,* 9 Cal.4th at p. 617.) Hence, the Halls' cause of action for negligent preparation of tax returns accrued under Code of Civil Procedure section 339, subdivision 1, upon their receipt of the notice of deficiency on or about January 3, 2006. (See, also *Sahadi v. Scheaffer, supra,* 155 Cal.App.4th 704, 727 [conclusion of IRS audit and execution of Form 870 marked the date of actual injury for purposes of commencing the statute of limitations in accounting malpractice action for negligent tax preparation].[4]) Consequently, their cause of action for negligent preparation of tax returns, filed more than two years later on February 22, 2008, was untimely.

The Halls' second cause of action for negligent tax advice, which alleged that EZ E-File negligently advised them that the filing of amended tax returns would result in refunds that would be applied to taxes then due for 2002, is similarly barred by the statute of limitations of Code of Civil Procedure section 339, subdivision 1. In *Van Dyke v. Dunker & Aced* (1996) 46 Cal.App.4th 446, 448, the court addressed the application of the statute of limitations in an accountant malpractice action arising from erroneous tax advice. There, the plaintiffs received erroneous tax advice from an accounting firm concerning the deductibility of a charitable contribution of real estate. (*Id.* at pp. 448–449.) The court held that the statute of limitations began to run when they filed their tax

[4] Unlike the taxpayers in *Sahadi,* who negotiated with the auditor and signed Form 870, the Halls did not respond to the auditor's findings and did not execute Form 2297 waiving the statutory notification of claim disallowance, and thus their action accrued when the IRS subsequently issued a statutory notice of deficiency. (*Sahadi v. Scheaffer, supra,* 155 Cal.App.4th at pp. 710–711, 727.) Hence, the rule in *Feddersen* applies.

return and acted on the erroneous advice. (*Id.* at pp. 448, 455.) The court distinguished *Feddersen*, reasoning that the "propriety of the tax advice [the appellants] received . . . was not contingent on the outcome of the IRS audit. There was nothing speculative about the damages they suffered in 1991 as a result of the alleged erroneous advice regarding the benefits of donating their property to a charitable organization. The determination by the IRS in 1994 regarding appellants' 1990 tax liability merely resolved the extent of their loss." (*Ibid.*)

Whether the alleged negligent tax advice pertained solely to the filing of the amended returns and thus the cause of action accrued when those returns were filed in 2004 (*Van Dyke, supra,* 46 Cal.App.4th at p. 455) or encompassed the negligent tax preparation that resulted in the notice of deficiency in January 2006, the Halls' claim is barred by the statute of limitations. In either event, the Halls' complaint alleging negligent tax advice was filed more than two years after they suffered actual injury as a result of the negligent conduct. (See *Feddersen, supra,* 9 Cal.4th at pp. 613–614.)

EZ E-File also claims that the court erred in awarding "negligence" damages on the Halls' cause of action for fraudulent inducement to loan money. In its statement of decision, the court acknowledged that the Halls had not proven fraud in connection with Hall's loan to Crittendon, but nonetheless awarded tort damages of $8,000, plus pre-judgment interest of seven percent. This was error.

In its statement of decision, the court made the following findings on the fraudulent inducement to loan money cause of action: "During trial, the plaintiff Mrs. Hall testified that at or about the time the IRS was auditing the Plaintiffs' tax returns, defendant Crittendon wrote Plaintiffs, informing them that Crittendon would be going out of business, and solicited a loan from the Plaintiffs in the amount of $8,000.00. Plaintiffs, concerned that if Crittendon went out of business Plaintiffs would not have the help they needed to defend the audits being conducted by the IRS, loaned $8,000.00 to Defendants. The evidence also established that the funds from the $8,000.00 'loan' were immediately made available to the business, and that defendant Kyles billed time against the fund and was paid from the funds Plaintiffs advanced to Crittendon. The 'loan' to

Crittendon was evidenced by a promissory note dated November 28, 2005 [and the note has not been paid]. Although there was some evidence at the trial that the indebtedness represented by the promissory note had been discharged in a Bankruptcy proceeding filed by Crittendon, taking the evidence as a whole, the funds were provided to both Crittendon and Kyles, and the funds were used to pay for services negligently rendered to the Halls. The loss of the funds, therefore, constitutes part of the Plaintiffs' tort damages for negligence, even if the contractual indebtedness represented by the promissory note was discharged. Plaintiffs' loss of the funds was complete and the sum was liquidated, as of November 28, 2005. In actions for the breach of an obligation not arising from contract, the court in its discretion may award prejudgment interest . . . . [and] the Court finds an award of prejudgment interest is necessary to compensate the plaintiffs . . . ."

The elements of a claim of fraudulent inducement to loan money are: (a) a misrepresentation, false representation, concealment or nondisclosure; (b) knowledge of falsity; (c) intent to defraud or to induce plaintiff to enter into a contract; (d) justifiable reliance; and (e) resulting damage. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) As the record demonstrates, the court made no findings that the Halls proved a cause of action for fraudulent inducement of a loan. To the contrary, the findings show that Crittendon made no false representations in inducing Hall to loan her the money. While the record shows that Crittendon and Hall executed a promissory note for the loan and that it was not repaid, it also suggests that the debt was discharged in bankruptcy, and the Halls do not urge otherwise.[5] Thus, even if we were to conclude that a contract action was pled in the Halls' cause of action for fraudulent inducement to loan money, that claim might have been discharged in the bankruptcy proceeding. In any event, the court did not award contract damages, it awarded damages for negligence, and the Halls' claims for negligence were barred by the statute of limitations. Accordingly, the judgment awarding them $8,000 in additional tort damages must be reversed.

[5] Title 11 United States Code section 524 (a)(1) voids any judgment "to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . ."

THE HALLS' APPEAL

1. Emotional distress claims

Given our analysis of the cross-appeal, the Halls' appeal is not meritorious. First, their claims for emotional distress are based on the underlying facts alleging negligent tax preparation and negligent tax advice. Even if the claims were cognizable, the law is settled that emotional distress damages are not available in negligence actions where there is no physical injury. (*Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689.) "[T]he law does not recognize a protectable interest in freedom from the emotional distress involved in paying taxes, even if the taxes might have been avoided by skilled legal advice and drafting. The fact that the alleged negligence here did not take place in a litigation context does not defeat the general rule that emotional distress damages are not recoverable when attorney malpractice leads only to economic loss." (*Id.* at p. 1691.) In analogizing tax advice to litigation, the court stated, "[a]s in a litigation context, the client's primary protected interest is economic in a tax planning situation. The prospect of paying taxes is generally considered distressing, and the prospect of paying a greater levy than necessary is even more disquieting. However, the emotional upset derives from an inherently economic concern." (*Id.* at p. 1697.)

The *Camenisch* rationale applies equally here in a case of negligent tax advice. While the Halls might have experienced emotional distress during the tax auditing process, their loss was purely economic, and thus this case is indistinguishable from the long line of cases holding that emotional distress damages are not available for economic loss. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 557–558 [emotional distress damages not available in case involving negligent construction of house where there was no physical injury]; *Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 852; disapproved on other grounds in *Adams v. Paul* (1995) 11 Cal.4th 583, 591, fn. 4 [no emotional distress damages for failing to file civil suit within statutory limitations period]; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1035, 1039 [no emotional distress damages for errors affecting division of assets in dissolution proceeding]; *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 7, disapproved on other grounds in *Ferguson v. Lieff, Cabraser,*

Heimann & Bernstein (2003) 30 Cal.4th 1037, 1053 [no emotional distress damages for failure to prevent claim from being discharged in bankruptcy].)

2. Fraud cause of action

The Halls also argue that the trial court erred in finding that they had not pled a cause of action for fraud. They argue that they alleged false representations, fraudulent advice, and reliance in the complaint, and that they proved fraud at trial.

The trial court in a footnote to its statement of decision stated, "[p]laintiffs' proposed amendments to the complaint did not include a cause of action for fraud in connection with the Defendant[s'] preparation of the Plaintiffs' tax returns, and accordingly, the Court does not reach that issue." This footnote was in reference to the court's finding that Crittendon falsely represented that she and Kyles were enrolled agents with the IRS. The complaint, however, did not include any allegations about Crittendon's and Kyles' licensing or registration status; the Halls did not attempt to amend the complaint to include those allegations until the eve of trial when they sought unsuccessfully to amend the complaint to include causes of action for violation of statutory tax preparer registration requirements. Hence, the Halls did not allege a fraud cause of action pertaining to EZ E-File's representations in preparing the Halls' tax returns.

At oral argument, counsel for the Halls argued that the Halls pled fraud by virtue of their allegations in their claims for negligent tax advice and intentional infliction of emotional distress — that EZ E-File falsely represented to the Halls that they were not required to pay taxes and gave the Halls false and fraudulent tax advice. The complaint, however, did not include a fraud cause of action, and the Halls did not seek to amend their complaint to plead a cause of action for fraud in order to conform to the proof adduced at trial. Rather, in a post-trial brief, they sought to amend their complaint to plead a cause of action for an intentional tort of infliction of emotional distress based on the stress the Halls endured as a result of the audit and EZ E-File's false and fraudulent

tax advice.[6] While a court has discretion to amend a complaint to conform to proof (see Code Civ. Proc., § 470), a court abuses its discretion when it permits an amendment that introduces new or substantially different issues in the case or one that prejudices the rights of the opposing party. (See *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31; *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 912.) Here, the issue of an amendment to plead a fraud cause of action was never before the court, because fraud was not the Halls' theory of trial.

"Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, 466.) The theory of trial doctrine is "often . . . justified on principles of estoppel or waiver." (*Id.* at p. 468.) " '[I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.' [Citations.]' " (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920, quoting *Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225.) It would be unfair to EZ E-File or to the trial court to permit the Halls now to advance a new cause of action and adopt a new and different theory on appeal. (*Strasberg,* at p. 920.)

3. Pre-trial Motion to Amend Complaint

The Halls contend that the trial court erred in denying their motion to amend the complaint to add a cause of action for violation of the tax preparer registration requirements of Business and Professions Code sections 22251 and 22253.[7]

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[6] They also sought to add a cause of action alleging violation of the statutory registration requirements for tax preparers.

[7] Business and Professions Code section 22251 defines a tax preparer as "[a] person who, for a fee or for other consideration, assists with or prepares tax returns for another person . . . ." Section 22253 of the Business and Professions Code requires tax preparers to register with the California Tax Education Council (CTEC). Finally, section 22257 of the Business and Professions Code provides that any person may maintain an action for

As the trial court found, the Halls' belated attempt on October 27, 2010 to amend the complaint prior to the scheduled trial date[8] was untimely. The Halls learned of the registration issues in March 2010 during depositions, though they could have made inquiries prior to that date. We agree with the trial court; had the plaintiffs exercised reasonable diligence, they could have discovered Crittendon's and Kyles' registration status well before their depositions in March 2010, and in any event should have taken steps to amend their complaint sooner had they wished to avail themselves of the statutory remedies of Business and Professions Code section 22251 et seq.

Moreover, as the trial court ruled in denying the motion, the claim was also barred by the statute of limitations because it was based on new allegations of facts and related to a statutory penalty. "[T]his cause of action would be barred by the statute of limitations because it relates to a different primary right, and as of the date the Complaint was filed, the plaintiffs should have been on inquiry notice if not having had constructive notice of the licensing status of the defendants."[9] (See *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 80 [where a plaintiff has two separate independent causes of action, assertion of one primary right within the statutory period does not excuse the failure to assert the other].) "Moreover, when there is an attempt to assert not merely a new theory, but liability on an entirely different state of facts, the failure to state a claim on the latter facts will defeat amendment of the complaint." (*Id.* at pp. 82–83.)

The Halls' claim that Crittendon and Kyles are estopped from asserting the statute of limitations because they fraudulently concealed their licensing status is without merit.

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violation of the statutory scheme and recover a civil penalty of $1,000 if a tax preparer failed to perform a duty required under Business and Professions Code sections 22251–22259. Kyles admitted during his deposition that he was not certified by the CTEC while Crittendon claimed that she was. At trial, it was established that Crittendon was also not certified by the CTEC at the time the Halls' tax returns were prepared. Both Crittendon and Kyles admitted that they were not enrolled agents with the IRS.

[8] The trial date was initially set for April 9, 2010, but was continued to July 30, 2010, and then rescheduled for August 20, 2010, and then ultimately set for November 29, 2010.

[9] Code of Civil Procedure section 340, subdivision (a) provides a one-year statute of limitations for a cause of action by an individual seeking a statutory penalty.

The trial court did not reach the issue of fraud, but on the record before us, we cannot conclude that the Halls were reasonably diligent in discovering Crittendon's and Hall's licensing status. " 'It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' " (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931, quoting *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99.)

The Halls further urge that the court erred in denying their post-trial request to amend the complaint to add the causes of action alleging violation of the statutory registration requirements for tax preparers because evidence on the issue was ultimately admitted at trial. While Crittendon, in response to questioning by the Halls' counsel, did testify about her licensing status at trial, EZ E-File points out that it did not object to this evidence due to the trial court's pre-trial ruling denying the Halls' request to amend the complaint. Allowing an amendment to conform to proof would have been an abuse of discretion under these circumstances. (See *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, 561 [abuse of discretion to permit amendment of pleadings to conform to proof where evidence improperly admitted on a new cause of action].)

EZ E-File relied on the court's prior ruling on the amendment in its defense of the case and presumably would have handled their examination of the witnesses and the case differently had statutory licensing been at issue. Further, the issues concerning the alleged statutory violations were not litigated at trial given the court's earlier ruling denying the Halls' motion for leave to amend the complaint. To permit the amendments post trial would have deprived EZ E-File of the opportunity to defend against the allegations. "At this stage of the game it was too late to permit [EZ E-File] to respond to [these] new [causes of action]." (*Strasberg v. Odyssey Group, Inc., supra*, 51 Cal.App.4th 906, 920.)

III. DISPOSITION

The judgment is reversed. The parties are to bear their own costs on these appeals.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.